No. 10,014

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS,
Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,
Appellee.

PETITION FOR REHEARING.

ELLIS I. HIRSCHFELD,
1215 Bankers Building, Los Angeles 14,
SAMUEL W. BLUM,
728 Board of Trade Building, Los Angeles 14,
Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS,
Appellants,
vs.
UNIVERSAL PICTURES COMPANY, INC., a corporation,
Appellee.

No. 10,014
Jan. 17, 1945

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before MATHEWS, STEPHENS and HEALY, Circuit Judges.

MATHEWS, Circuit Judge.

In a German court called the Landgericht, Mayfilm Aktiengesellschaft, a German corporation, hereafter called Mayfilm, brought an action against Universal Pictures Corporation, a New York corporation, seeking thereby to recover of the New York corporation 50,000 reichsmarks, claimed to be due and owing to Mayfilm, with interest from July 1, 1926. On March 4, 1930, the Landgerich rendered judgment to the effect that Mayfilm take nothing by its action. From that judgment Mayfilm appealed to a German court called the Kammergericht. In that court, on July 27, 1932, Mayfilm obtained judgment against the New York corporation for the amount claimed—50,000 reichsmarks, with interest from July 1, 1926. That judgment, hereafter called the Mayfilm judgment, was affirmed by a German court called the Reichsgericht on February 3, 1933.

Thereafter, prior to January 19, 1937, appellee, Universal Pictures Company, Inc., a Delaware corporation, acquired all property and assets of the New York corporation and assumed

all just and valid obligations of the New York corporation, and the New York corporation was dissolved.

On January 19, 1937, appellants, John Luhring and Margaret Morris, citizens of California, claiming to be the owners of the Mayfilm judgment, brought an action thereon against appellee[1] in the Superior Court of Los Angeles County, California, seeking thereby to recover of appellee $35,256.99,[2] with interest from January 1, 1937. On appellee's petition, the action was removed from the Superior Court to the District Court of the United States for the Southern District of California. Appellee answered, jury trial was waived, the case was tried by the court, findings of fact and conclusions of law were stated, and judgment was entered in appellee's favor. From that judgment this appeal is prosecuted.

The question is whether appellants were the owners of the Mayfilm judgment.

The complaint alleged and the answer[3] denied that the Mayfilm judgment was assigned to appellants by Union Bank & Trust Company of Los Angeles, a California corporation, hereafter called Union Bank. No other title to the Mayfilm judgment was asserted by appellants. The evidence showed that on January 16, 1937, Union Bank executed what purported to be an assignment of the Mayfilm judgment to appellants,[4] but there was no evidence that Union Bank ever owned the Mayfilm judgment.

The complaint alleged and the answer denied that the Mayfilm judgment was assigned to Union Bank by Fritz Mandl. There was no evidence of any such assignment. The evidence showed that on April 22, 1936, Mandl executed what purported

[1]The New York corporation, also named as a defendant, was dissolved before this action was brought. Appellee, therefore, is here treated as the sole defendant.

[2]Claimed to be the value, on January 1, 1937, of the principal sum (50,000 reichsmarks), plus accrued interest (38,142.48 reichsmarks), awarded to Mayfilm by the Mayfilm judgment.

[3]The complaint and answer referred to in this opinion are appellants' amended complaint and appellee's amended answer thereto.

[4]This purported assignment was received in evidence as appellants' Exhibit 8.

to be an assignment to Union Bank,[5] but that was not, and did not purport to be, an assignment of the Mayfilm judgment. It purported to be an assignment of a claim.[6] There was no evidence that Mandl ever owned the Mayfilm judgment.

The complaint alleged and the answer denied that the Mayfilm judgment was assigned to Mandl by Bank fur Auswartigen Handel Aktiengesellschaft, a German corporation, hereafter called the German bank. There was no evidence of any such assignment. Mandl testified that a claim of the German bank against the New York corporation was assigned to him by the German bank,[7] but he did not testify that the Mayfilm judgment was assigned to him by the German bank or anyone else. There was no evidence that the German bank ever owned the Mayfilm judgment.

The complaint alleged and the answer denied that the Mayfilm judgment was assigned to the German bank by Joe May. There was no evidence of any such assignment. The evidence showed that on February 12, 1936, the German bank wrote a letter to the New York corporation,[8] stating that May had given the German bank an assignment of the Mayfilm judgment, but there was no evidence that the statement was true. A purported copy of the purported assignment was set out in the letter, but the original—if an original existed—was not put in evidence. There was no evidence that it ever existed, nor was there any evidence that May ever owned the Mayfilm judgment.

The complaint alleged and the answer denied that on February 25, 1935, in an action by the German bank against Mayfilm, the Landgericht rendered a judgment "providing" that the

[5]A translation of this purported assignment was received in evidence as appellants' Exhibit 6.

[6]It mentioned two claims—a claim of Mayfilm against the New York corporation and a claim of Bank fur Auswartigen Handel Aktiengesellschaft against Mayfilm—and stated: "With these premises, I, the undersigned Fritz Mandl, hereby assign this claim to [Union Bank]." Which of the two claims was "this claim" we do not know.

[7]This assignment was not put in evidence. Mandl testified that it was a written assignment executed "between 1932 and 1934," but that he did not know where it was.

[8]A translation of this letter was received in evidence as appellants' Exhibit 5.

alleged assignment of the Mayfilm judgment by May to the German bank was legally valid. There was no evidence that the Landgericht rendered any such judgment. The evidence showed that on May 30, 1934, the German bank brought an action against Mayfilm in the Landgericht, alleging that the claim asserted by Mayfilm in its action against the New York corporation—the claim on which the Mayfilm judgment was based —was the property of May and not of Mayfilm, and that May had assigned the claim to the German bank.[9] On February 25, 1935, in the German bank's action against Mayfilm, the Landgericht rendered a declaratory judgment to the effect that the claim was the property of May and not of Mayfilm, and that the alleged assignment of the claim by May to the German bank was legally valid. The declaratory judgment did not declare that the Mayfilm judgment was the property of May, or that May had assigned the Mayfilm judgment to the German bank—validly or otherwise. No assignment of the Mayfilm judgment was mentioned or referred to in the declaratory judgment.

There was no evidence that the Mayfilm judgment was ever assigned or transferred by Mayfilm, or that title to the Mayfilm judgment ever passed from Mayfilm. The District Court accordingly found that the Mayfilm judgment was at all times the property of Mayfilm, and that neither May nor the German bank nor Mandl nor Union Bank nor appellants ever acquired or owned the Mayfilm judgment. These findings are amply supported by evidence.

The District Court concluded, and we agree, that appellants were not entitled to recover in this action.

Affirmed.

(Endorsed:) Opinion. Filed Jan. 17, 1945. Paul P. O'Brien, Clerk.

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[9]A translation of the pleadings and judgment in the German bank's action against Mayfilm was received in evidence as appellants' Exhibit 4. Neither the New York corporation nor appellee was a party to that action.

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vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,
Appellee.

PETITION FOR REHEARING.

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit and to the Honorable Judges Thereof:

Comes now the appellants in the above entitled cause and presents this their petition for rehearing, and in support thereof respectfully show:

Statement of Grounds for Rehearing.

That the Opinion of this Honorable Court, in affirming the judgment of the District Court in the above entitled case:

(1) Is directly contrary to, and erroneously applies the German law regarding assignment of judgments, by hold-

ing that an assignment of the *claim*, confirmed in and made enforceable by a judgment, does not carry with it an assignment of and title to the judgment itself.

(2) Misconstrues and overlooks the undisputed evidence that under German law a judgment as such is *not* assigned; that only the *claim* is assigned, and that *title* to the *judgment* follows the *title* to the claim.

(3) Conflicts with, and is contrary to the established American law that the claim merged in and evidenced by a judgment, and the judgment itself, are inseparable, and that an assignment of such claim carries with it an assignment of the judgment itself.

(4) Ignores the fact that appellee did not challenge, but actually conceded the sufficiency of the assignment from Mandl to the Union Bank to effectuate a transfer of the May Film judgment to Union Bank, if Mandl owned said judgment.

(5) Misconstrues the effect of the German Declaratory Judgment, by erroneously holding that said decree declared that the *claim* upon which the May Film Judgment is based was the property of May, and not of May Film Corporation and that May's assignment thereof to the German Bank was valid, but did not declare that the May Film *judgment* was the property of May and that his assignment thereof to the bank was valid. In so erroneously holding, this Court overlooked, and failed to consider, the undisputed evidence that under German law the ownership of and title to a judgment follows the ownership of and title to the claim, and that it is the claim, not the judgment, which is assigned.

(6) Erroneously holds that there is no evidence (a) that Union Bank, or (b) that Mandl, or (c) that German

Bank, or (d) that May, ever owned the May Film judgment. This is based upon an erroneous holding that the assignment of the claim against Universal was not an assignment of the May Film judgment itself. Such holding is contrary to the German law which holds that it is the claim, not the judgment which is assigned, and that title to the judgment follows title to the claim; it is also contrary to the American law which holds that the claim and the judgment itself are inseparable, and that an assignment of the claim carries with it an assignment of and title to the judgment itself.

(7) Erroneously holds that there is no evidence that the May Film judgment was ever assigned or transferred by May Film Corporation, or that title to the May Film judgment ever passed from May Film Corporation. This is based upon an erroneous interpretation of the legal effect of the German Declaratory Decree, and by overlooking or misconstruing the German law which holds that the title to the judgment *follows* title to the claim; and that it is the claim, not the judgment, which is assigned.

(8) Erroneously holds that the findings which state that the May Film judgment was at all times the property of May Film Corporation, and that neither May nor the German Bank, nor Mandl, nor Union Bank, nor appellants, ever acquired or owned the May Film judgment are supported by the evidence, when in fact the evidence is contrary thereto.

(9) Ignores the fact that appellee has never challenged, but has conceded, the principle that the assignment of the claim upon which the May Film judgment was based also constituted an assignment of the May Film judgment. Appellee contended that the "claim" was never assigned,

and therefore as a consequence the May Film judgment was never assigned.

(10) Disregards the well settled principle that the intention of the parties to an assignment prevails, and that an assignment must be upheld if possible.

(11) Disregards entirely the principle that where neither assignor nor assignee questions, but admits, the sufficiency of an assignment that the debtor then cannot question its sufficiency.

(12) Fails to consider all of the evidence regarding the assignment from Bank to Mandl, and fails to determine whether there was an equitable and therefore an actual assignment of the judgment from Bank to Mandl.

(13) Disregards appellants' contention that the material findings are but conclusions of law, and are insufficient to constitute findings of fact, either in form or substance.

(14) Disregards appellants' contention that the trial court erred in admitting evidence attempting to show the German Declaratory Decree was erroneous.

(15) Disregards appellants' contention that the judgment herein is based upon findings which in material matters are not sustained by the evidence but actually is contrary thereto.

(16) Disregards appellants' contention that the judgment herein and the conclusions of law are contrary to the law.

(17) Misconstrues and overlooks the factual situation upon which appellants' cause of action is based.

(18) Affirms a judgment which plainly is erroneous and unsupported by and contrary to the evidence; and that the opinion itself turns upon an issue which is not, and

was not in the case, but is one created solely by this Court, to-wit: whether the assignment of the claim against Universal constituted an assignment of the May Film judgment itself, and this Court's determination of that issue is directly in conflict with and contrary to both the German and American law on that subject.

Statement of Facts.

The opinion fails to fully state the factual situation involved herein. A brief résumé is therefore necessary for a complete understanding of the points urged.

In 1926 May Film Corporation, a German corporation, brought action against Universal Pictures Corporation, a New York corporation, for breach of contract in the Landgericht (Superior Court), a German court, for recovery of 50,000 German Reich marks and interest. On May 4, 1930, judgment was rendered for defendant. [R. pp. 106-114.]

On July 27, 1932, upon appeal, the Kammergericht (District Court of Appeal), a German court, reversed the Landgericht judgment, and awarded May Film a judgment against Universal for 50,000 German Reich marks with interest from July 1, 1926. [R. pp. 117-170.] On February 3, 1933, the Reichsgericht (Supreme Court), a German court, affirmed said judgment. [R. pp. 171-197.]

On May 30, 1934, the Bank of Foreign Commerce, a German bank, asserting ownership to the May Film judgment, commenced an action for declaratory relief against the May Film Corporation in the Landgericht to have it declared that the claim asserted in the *May Film v. Universal* case was the property of May, and not the May Film Corporation, and that May's assignment thereof to

the Bank was valid. [R. p. 206.] The liquidator of May Film Corporation was then disputing the Bank's ownership of May Film claim and judgment.

On February 11, 1935, the Landgericht rendered judgment declaring that the May Film claim—50,000 Reich marks, with interest from July 1, 1926—was the property of May, and not of May Film Corporation, and that May's assignment thereof to the Bank was valid. [R. pp. 226-7.] Said action disclosed that on May 30, 1932, May had assigned the May Film claim to the Bank. [R. pp. 210-212.]

During the trial of the instant case May testified that on May 9, 1932, he further executed the original of an assignment of the May Film *claim* and *judgment* to the Bank, a copy of which appears in Plaintiff's Exhibit 5. [R. p. 482.]

The assignment by May to the Bank of the May Film claim and judgment was "by way of security" for an obligation due the Bank. This obligation had been guaranteed by May and Fritz Mandl. [R. pp. 264, 280.]

Subsequently Mandl, as guarantor, paid this obligation and became entitled to the security, *i. e.*, the May Film claim and judgment. Mandl's right to receive this security was not questioned by appellee. [R. pp. 263, 280.] Appellants introduced evidence, oral and documentary, of a written assignment of the May Film claim by the Bank to Mandl [R. pp. 264, 270, 295-7, 246-7] as well as facts disclosing an assignment by operation of law.

Under date of February 12, 1936, said Bank in writing notified Universal in New York that the claim against Universal in the amount of 50,000 Reich marks together with interest from July 1, 1926, "had been transferred to Mandl," and that Universal "can satisfy this debt only by payment to" Mandl. [R. pp. 295-7.]

On April 29, 1936, Mandl in writing assigned the claim against Universal to the Union Bank. [R. pp. 254-6.]

On January 16, 1937, Union Bank assigned the May Film judgment to appellants. [R. pp. 258-9.]

Appellee did not challenge or question these last two assignments. [R. pp. 30, 253, 258; see Appellee's Br. p. 2, note 2.]

At the trial the May Film judgment was computed in American dollars as $11,862.50 principal, $12,472.26 interest to September 24, 1940. [R. pp. 301-5, 120, 303, 549.]

Appellee conceded that the New York corporation, the original judgment debtor, had been dissolved and that appellee had assumed and agreed to pay the former's obligations, subject to all defenses and set-offs. [R. p. 20.]

At the trial below, the appellee's own witness testified, and the undisputed evidence shows, that UNDER GERMAN LAW, A JUDGMENT AS SUCH CANNOT BE TRANSFERRED; THAT ONLY THE CLAIM CAN BE TRANSFERRED AND THAT THE TITLE TO THE JUDGMENT FOLLOWS THE TITLE TO THE CLAIM. [R. pp. 328, 391-2.]

The Court herein obviously has *overlooked* the foregoing vital evidence in rendering its decision herein.

Outline of Appellants' Chain of Title.

The vital question herein is whether appellants established their ownership to the May Film judgment. The following graphically illustrates that the answer thereto must be "yes."

To better understand this outline this Court must bear in mind:

(a) That under German law a judgment as such cannot be assigned: that *only the claim* can be assigned, and that title to the judgment follows the title to the claim.

(b) That under American law the claim or debt evidenced by or in the judgment, and the judgment itself are *inseparable*, and that an assignment of the claim, whether before or after judgment, carried with it an assignment of and title to the judgment itself.

These principles are fundamental and presently will be more fully developed and discussed.

I. Appellants established their ownership to the May Film judgment.

(1) The German Declaratory Decree conclusively adjudicated, declared and established "that the claim asserted in the case of May Film Corporation vs. Universal . . . in the amount of 50,000 R. M. with interest is the property of Joe May personally, and not of May Film Corporation . . . and therefore the assignment made by May to plaintiff (German Bank) is legally valid." [R. pp. 226-7.]

(a) This, under German law—that ownership of the judgment follows the ownership of the claim—constitutes an adjudication that the May Film judgment was the property of Joe May, and not of May Film Corporation, and that the assignment thereof to the Bank was valid.

(2) The German Declaratory Decree itself is effective as and itself constitutes an assignment or transfer of the claim against Universal (and therefore under German law of May Film judgment itself) from May Film Corporation to Joe May, and from him to the German Bank; it established the *ownership* of May Film judgment *in the German Bank* and *divested* May Film Corporation of any and all ownership in and to the May Film *judgment*.

(a) The judgment roll therein further discloses that May Film Corporation assigned the claim against Universal to Joe May, who in turn assigned it to the Bank. Said assignment under German law carried with it the title to the May Film judgment.

(b) May testified that he executed an assignment of the claim and the May Film judgment to Bank, a copy of which appears in Plaintiff's Exhibit 5. [R. p. 482.]

(3) There was an effective transfer of the claim against Universal (and therefore of the May Film judgment) from Bank to Mandl.

(a) By actual assignment—Mandl's undisputed testimony of the assignment by Bank of the claim (and therefore of the May Film judgment) to him.

(b) By the "notice" from the Bank to Universal constituting an equitable, and therefore an actual, assignment under the law of the forum; and under American law providing that an assignment of a claim carries with it an assignment of and title to the judgment itself.

(c) By operation of law.

(4) There was an effective transfer of the claim against Universal (and therefore of May Film judgment) by Mandl to the Union Bank.

(a) By actual written assignment—the assignment of the claim against Universal under either German or American law carried with it the ownership of and title to May Film judgment itself.

(b) This assignment was not challenged by appellee, either below or in this Court, and was conceded to be sufficient to transfer whatever interest Mandl owned in the May Film judgment to the Union Bank. [See Appelee's Br. p. 2, note 2, and R. p. 253.]

(5) The written assignment of the May Film judgment by Union Bank to appellants, being unchallenged by appellee, or by this Court, completes appellants' chain of title to and ownership of the May Film judgment in appellants.

II. The Declaratory Decree was effective to vest title of the claim against Universal (and therefore of the May Film judgment) in Joe May as against Universal. It constituted a "muniment of title" in appellants' chain of title, and under appellee's contention said decree is conclusive against it even though Universal was not a party to that suit.

(1) Appellee stands in the shoes of May Film Corporation when it asserts that May Film Corporation, notwithstanding the Declaratory Decree, still owns the May Film judgment, and, like May Film Corporation, it is conclusively bound by the said Decree.

(2) The Decree is evidence against appellee as a conclusive "muniment of title" under the laws of the forum which governs on matters of evidence.

ARGUMENT—POINTS—AUTHORITIES.

I.

The Decision Herein Is Based Upon the Erroneous Premise That the Assignment of the Claim Against Universal Did Not Transfer The Title to the May Judgment Itself. This Is Contrary to the Established German and American Law Relating to Assignment of Judgments.

This Court in affirming the judgment herein has placed its decision upon the hypertechnical, though erroneous, ground that the various assignments of the claim against Universal, while they transferred the *claim,* were insufficient to and did not transfer the title to or the ownership of the May Film *judgment* itself. This is the basis of the Court's decision herein. No such issue was involved in this case. No such contention was urged by appellee. It was conceded, and the undisputed evidence shows, that if the *claim* against Universal was assigned, that such assignment carried with it the title to the May Film *judgment* itself. Yet this Court, without citation of any authority, has sustained the judgment upon a theory which can find no support in either the evidence or under settled principles of German or American law. This basic error has been caused by the following:

(1) The Decision Herein Overlooks the Undisputed German Law Which Holds That a Judgment as Such Cannot Be Assigned; That Only the Claim Can Be Assigned and That Title to the Judgment Follows Title to the Claim.

It is apparent that this Court has failed to consider the following important evidence herein. *Appellee's* own witness, Dr. Golm, testified on direct examination as follows:

> "Q. By Mr. Selvin: Upon the facts which we assumed in my first question, Doctor Golm, do you have an opinion as to whether or not the part, that we referred to in the hypothetical question as Joe May, acquired, by reason of this circumstances, any interest in or title to the judgment of the Kammergericht as distinguished from the claim upon (144) which the judgment is founded? A. IN GERMAN LAW YOU CANNOT TRANSFER A JUDGMENT, AS SUCH; THAT MEANS THE DOCUMENT. YOU CAN TRANSFER ONLY THE CLAIM, AND THE TITLE TO THE JUDGMENT FOLLOWS THE TITLE TO THE CLAIM.
>
> Q. So that if no title to the claim was acquired none was acquired to the judgment? A. That is impossible." [R. pp. 327-8.]

And in answer to a further question, the same witness further testified:

> "A. SUPPOSING IN THE CASE THE PARTY HAS A JUDGMENT, WHICH MEANS REALLY THAT THE PARTY HAS A CLAIM AGAINST A CERTAIN DEBTOR WHICH HAS BEEN CONFIRMED AND MADE ENFORCEABLE BY A JUDGMENT."[1] [R. pp. 328-9.]

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[1]The witness then explaining a method by which the *writ of execution* could be transferred to a new creditor.

On cross-examination this same witness testified as follows concerning both the pledging and assignment of a judgment under German law:

"Q. How is a judgment pledged? A. A judgment, as such, can never be pledged, because a (243) judgment is a document which is the proof in which is vested a claim. The claim resulting from this judgment or confirmed by this judgment can be pledged.

Q. You said yesterday that if a claim is assigned the judgment follows the claim? A. If a claim is assigned—are you speaking about the pledge now, or about the assignment? It is quite different.

Q. I asked you how can we pledge a judgment. You said you cannot pledge a judgment. A. You can pledge the claim.

Q. You can pledge the claim? A. Yes.

Q. When you pledge a claim on which there is a judgment how is this done? A. This has to be done in this way: That I give a declaration stating, 'I herewith pledge the claim, which is dealt with and which is fixed in this judgment, to you, as my creditor.' And since the judgment itself—I mean the piece of paper is a tangible thing it would be far more necessary that I deliver this corporeal thing to the creditor.

Q. What is the corporeal thing that you would deliver? A. The piece of paper.

Q. What piece of paper? A. The judgment rendered by the Court. But this is not a necessary—that is not the principal thing which is necessary in order to pledge a claim. As I SAID YESTERDAY, (244) THE JUDGMENT FOLLOWS THE CLAIM.

> Q. Yes. A. IF THE CLAIM IS ASSIGNED TO FULL EXTENT AND TO FULL RIGHT THEN THERE IS NO DOUBT THAT THE CREDITOR HAS THE RIGHT TO CLAIM THE JUDGMENT, ALSO, and there is no doubt, either, that in this case the creditor is entitled to a further step, which I wanted to point out yesterday." [R. pp. 392-3.]

The foregoing evidence conclusively shows that under German law the various assignments of the claim against Universal (May Film to May to Bank to Mandl) as well as the adjudication of *ownership* of the claim by the Declaratory Decree, carries with them, and each of them, not only the title to and ownership of the claim, *but also the title to and ownership of the May Film judgment itself*. This Court's decision to the contrary is unquestionably error.

(2) The Decision Is Also Contrary to the Well Settled Principles of American Law That the Claim and the Judgment Are Inseparable, and That an Assignment of a Claim, Whether Before or After Judgment, Carries With It the Title to and Ownership of the Judgment Itself.

If the sufficiency of the various assignments, or some of them, are to be tested by the application of the American law, the decision herein, nevertheless, is basically erroneous. The severance by this Court of the ownership of the *claim* against Universal from the ownership of the May Film *judgment* itself is completely incompatible with the settled American doctrine that the ownership of the claim and the ownership of the judgment are *inseparable,* and that the ownership of both the claim and the judgment passes with an *assignment of either* the claim or the judgment.

This rule is best stated in the leading case of *Rufe v. Commercial Bank,* 99 Fed. 650 (4th Cir.).

It appears in this case that *after* rendition of judgment in another action, judgment creditor gave a power of attorney to his lawyer to collect from judgment debtor the moneys recovered by the judgment. The power of attorney operated as an assignment of the *moneys* so recovered. No assignment of the judgment itself was given. Subsequently the judgment was vacated and another judgment was rendered. A dispute arose over the ownership of the second judgment, the bank asserting its ownership through the aforementioned assignment, while Rufe asserted that the power of attorney assigned only the *claim,* but not the *judgment* itself, and therefore the bank's contention was defective. The Circuit Court upheld the assignment in the following language (p. 653):

> "It is contended that the irrevocable power of attorney did not give Mr. Blackford any interest in the judgment, but only in the proceeds of the judgment. *The judgment is nothing but the adjudication of the court in respect to the cause of action.* McNulty v. Hurd, 72 N. Y. 521. It furnished the means of enforcing the collection of the debt. *'It is impossible to separate them. The judgment would be barren, nor can we conceive of its existence without the debt.'* Pattison v. Hull, 9 Cow. 747. *The debt is the principal thing. By whatever terms the assignment was made, if the debt passed all rights and remedies for its collection also passed with it. The right to the debt, as evidenced by the judgment against the defendants, cannot exist in the hands of different persons. One cannot hold the judgment, and another the debt. They are inseparable.* Bolen v. Crosby, 49 N. Y. 183. *So when the instrument*

passed the whole sum evidenced in the judgment, and devoted it, in the hands of Mr. Blackford, to certain specific uses, with that passed also 'all the rights and remedies for its recovery and collection;' that is to say, the judgment and its incidents." (Italics ours.)

In *Ashburn v. McDonald*, 91 Mont. 83 (5 Pac. (2d) 586), it was also contended that the assignment of the claim did not carry with it the title to the ensuing judgment. In rejecting such a contention, the Supreme Court of Montana stated:

"But plaintiff contends that the assignment of the claim did not carry with it the judgment thereafter procured on the claim. This contention cannot be sustained. *The assignment of a debt carries with it all rights that are incidental to it* (3 Cal. Jur. 279). *The judgment is a step taken for the purpose of enforcing the claim by merging the claim into the form of a judgment. The assignment of the claim operated as assignment of the means of enforcing it and carried with it the judgment."* (Italics ours.)

In *Batesville Institute v. Kauffman*, 18 Wall. 154 (21 L. Ed. 775), the Supreme Court stated the following:

"Again, no principle is better settled than this, that the assignment of a debt carries with it an assignment of a judgment or mortgage by which it is secured."

In *North v. Evans*, 1 Cal. App. (2d) 64 (36 Pac. (2d) 133), the California Court also held that *one* person cannot hold the judgment and *another* person hold the debt, as they are *inseparable*.

In *Brown v. Scott*, 25 Cal. 189, the California Supreme Court held that an assignment of the judgment effected an

assignment of the debt for which it was obtained, even though the judgment itself was void as being beyond the jurisdiction of the court to make.

In 3 Cal. Jur., page 279, we find the following rule:

> "32. Incidental rights. The assignment of a debt ordinarily carries with it all rights that are incidental to it, and entitled the assignee to all remedies, liens or securities that could have been used, or made available by the assignor as a means of indemnity or payment."

One of those rights incidental to an assignment of a claim, which becomes, or has been merged in a judgment, *is the judgment itself.* Thus the ownership of the judgment passes with the assignment of the debt or claim. *(Rufe v. Commercial Bank, supra; Ashburn v. McDonald, supra.)*

Other authorities which hold that the debt and the judgment thereon are inseparable, and that an assignment of one carries with it the assignment of the other, that is, the assignment of the claim carries with it the assignment of the judgment, or the assignment of the judgment carries with it the assignment of the claim, are: *Pattison v. Hull,* 9 Cow. 747; *Bolan v. Crosby,* 49 N. Y. 183; *Wright v. Parks,* 10 Iowa 349; *2 Black on Judgments* 1405; *2 Freeman on Judgments* 2206; 5 *C. J.* 951, Par. 129.

We therefore respectfully submit that under *both the German and American law* the various assignments by which the "claim against Universal" was assigned, whether before or after the rendition of the May Film judgment, *as a matter of law carried with them the title to the May Film judgment itself.* Accordingly, the decision herein to the contrary, is basically erroneous, and a rehearing should be granted herein so that such error may be corrected.

II.

The Decision Erroneously Limits the Scope and Effect of the German Declaratory Judgment to a Declaration of the Ownership and Assignment of the Claim, as Distinguished From the Ownership of the May Film Judgment Itself. There Is No Such Distinction Under German Law Which Provides That the Title to the Judgment Follows the Title to the Claim.

The Court in its opinion states:

> "On February 25, 1935, in the German Bank's action against Mayfilm, the Landgericht rendered a declaratory judgment to the effect that the *claim* was the property of May and not of Mayfilm, and that the alleged assignment of the claim by May to the German bank was legally valid. *The declaratory judgment did not declare that the Mayfilm judgment was the property of May, or that May had assigned the Mayfilm judgment to the German bank—validly or otherwise. No assignment of the Mayfilm judgment was mentioned or referred to in the declaratory Judgment.*" (Italics ours.)

The italicized portion of the foregoing statement we submit is clearly erroneous. It overlooks a *fundamental* principle of German law.

(1) The Declaratory Judgment in Effect Did Declare That the May Film Judgment Was the Property of May and That His Assignment of Said Judgment to the Bank Was Valid.

The declaration in the Declaratory Decree, as to the ownership and assignment of the *claim,* likewise constituted a declaration as to the ownership and assignment of the May Film *judgment* itself, for under the German law the title to the May Film judgment followed the title to the claim upon which it was based. Furthermore, the German law also provided that the May Film *judgment* as such could *not* be assigned, but that *only the claim could be assigned and that such assignment carried with it the title to the May Film judgment itself.*

Obviously this Court in speaking of the Declaratory judgment has overlooked the testimony previously quoted under the preceding point in this Petition to the effect that under German law the judgment "means the document"; that a person "cannot transfer a judgment as such" but "can transfer only the claim, and the title to the judgment follows the title to the claim"; that "in the case the party has a judgment" this "means really that the party has a *claim* against a debtor which has been confirmed and made enforceable by a judgment" [R. pp. 328-9]; that "the judgment follows the claim" and "if the claim is assigned to full extent and to full right, then there is no doubt that the creditor has the right to claim the judgment also." [R. pp. 392-3.]

This evidence clearly demonstrates that the Declaratory judgment did "declare that the Mayfilm judgment was the

property of May" and "that May had assigned the Mayfilm judgment to the German Bank—validly." It also completely explained why "no assignment of the Mayfilm judgment was mentioned or referred to in the declaratory judgment," namely, because under German law *the judgment as such could not be assigned; that only the claim could be assigned.* The Declaratory judgment, therefore, *properly* referred only to the assignment of the claim *without reference to any assignment of the May Film judgment itself.* This was correct under the German law. Nevertheless, the title to the May Film judgment, under that law, followed the title to the claim without reference to an assignment of the judgment itself.

Furthermore it was definitely stated and understood that the Declaratory judgment included, not only a declaration as to the claim, but also a declaration as to the ownership of the May Film judgment itself. This is disclosed by the following proceedings had when Dr. Pinner was testifying:

> "The Court: The court gave judgment which stated that May Film Corporation did not own, but that Joe May owned the judgment; is that correct? A. Yes, I got the judgment according to my complaint, favorable to May (368).
>
> The Court: All right.
>
> Q. By Mr. Hirschfeld: And, also, that the assignment was made to the Bank for Foreign Commerce? A. Yes; that is included in the judgment."[2] [R. p. 489.]

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[2]The questions and answers are referring to the German declaratory judgment.

It was never appellee's position that an assignment of or ownership of the claim did not carry with it the ownership of the May Film judgment. This was properly conceded. Appellee contested the ownership of the *claim;* not the ownership of the claim, as distinguished from the ownership of the May Film judgment itself. It contended that notwithstanding the adjudication in the Declaratory judgment that May, and not May Film, was the owner of the claim; that said adjudication was *incorrect,* and that May, in fact, was *not* the owner of the *claim,* and thus acquired no ownership in the May Film judgment itself.

Such contention was and is erroneous.

The effect of the decree as *evidence* in this action will be discussed in the succeeding pages of this Petition.

It follows from what we have said herein that this Honorable Court's interpretation of the Declaratory judgment in limiting it to an adjudication of the claim, as distinguished from the ownership of the May Film judgment, is clearly erroneous.

A rehearing is necessary to correct such error.

III.

The Evidence Is Sufficient to Establish Appellants' Ownership to the May Film Judgment. The Decision Herein, to the Contrary, Overlooks and Misconstrues Important Evidence, and the Legal Principles Applicable Thereto.

The Court in its opinion states:

> "There was no evidence that the Mayfilm judgment was ever assigned or transferred by Mayfilm, or that title to the Mayfilm judgment ever passed from Mayfilm. The District Court accordingly found that the Mayfilm judgment was at all times the property of Mayfilm, and that neither May nor the German bank nor Mandl nor Union Bank nor appellants ever acquired or owned the Mayfilm judgment. *These findings are amply supported by evidence.*"

This conclusion, we submit, is incorrect. The Court in evaluating the evidence overlooked the evidence which disclosed that under German law it is the claim, not the judgment, which can be assigned, and that title to the judgment follows the title to the claim. It also was under the misapprehension, as to both German and American law, by making a distinction between an assignment of a claim, and the assignment of the judgment itself, when in fact no such distinction exists.

As a result, this Honorable Court erroneously concluded that the various assignments of "claims against Universal," without an actual assignment of the May Film judgment itself, were insufficient to transfer the May Film judgment. It further erroneously concluded that the Declaratory judgment was a declaration relating solely to the ownership and assignment of the claim, and therefore it

was held insufficient to include the May Film judgment itself. In these conclusions this Honorable Court was basically wrong.

We therefore submit that a re-examination of the evidence, correctly interpreted, will clearly establish appellants' ownership to the May Film judgment itself. This ownership will be traced from its source down to the appellants.

(A) The Declaratory Judgment.

This Declaratory judgment is the foundation of, and the introductory fact to, a link in appellants' chain of title. It is from this decree that appellants stem their ownership of the May Film judgment. It is therefore of prime importance to determine not only the scope of its adjudication, but also its admissibility, value and weight as evidence in this case as against appellee.

(1) The Declaratory Judgment Declared and Conclusively Established, Between the Parties Thereto, i. e., the German Bank and May Film Corp., That the May Film Judgment Was the Property of May, and Not of May Film, and Therefore May's Assignment of Said Judgment to the German Bank Was Valid.

While the decree by its terms refers to the "claim asserted in the case of May Film Corporation vs. Universal" this, under German law, included the May Film judgment and constituted an adjudication and declaration as to the ownership of the May Film judgment itself.

It was conceded that under German law the title to the judgment followed the title to the claim, and that the judgment as such could not be assigned; that only the claim could be assigned. (Point I of this Petition.)

Likewise it was conceded that the Declaratory judgment, between the parties thereto, established and adjudicated that the May Film judgment was the property of May, and not of May Film; that May's assignment thereof to the Bank was valid, and that said decree was binding upon and conclusive and *res adjudicata* between the parties to that judgment. [R. pp. 338-340, 342, 369, 489.]

(2) The Effect of the Declaratory Judgment Was to Transfer Title of the May Film Judgment From May Film Corporation to the German Bank. It Divested May Film Corporation of All Title to the May Film Judgment and Established the Title Thereto in the German Bank.

This rule is succinctly stated in Restatement of the Law —Judgments—page 524:

> "110. JUDGMENT AS A TRANSFER OF TITLE.
>
> "In an action involving any property interest, where a court which has jurisdiction over the property interest renders a judgment which determines that one of the parties has a right or title superior to that of the other party, the judgment has the effect of an involuntary transfer from the unsuccessful party to the other."
>
> ". . . The rule may operate to create or to destroy a title or claim the validity of which is dependent upon whether there was or was not a transfer from one of the parties to the action to the other. . . ."

In the leading case of *Chapman v. Moore*, 151 Cal. 509 (51 Pac. 324), the California Supreme Court in referring to the effect of a decree in another action as a

transfer of title between the parties thereto, as against a stranger to that action, stated (p. 516):

> "It was conceded on the trial that in 1887 the legal title to the lot in controversy was in Walter Patterson. . . . It was defeated and barred by the judgment obtained by Davis, the predecessory of plaintiff, against Patterson in 1894. As between these two it was there adjudged that the legal title, conceded . . . in Patterson, was, as against him, in Davis, *and such adjudication was as effective evidence of title to the property in the latter . . . as if Patterson had made him a conveyance of it by deed. . . .*"[3] (Italics ours.)

In *Title Insurance Company v. United States F. & G. Co.*, 121 Cal. App. 73 (76-77), the effect of a decree in another action as evidence against a stranger was also involved; the Court stated:

> "If the judgment in the quiet title action brought by Maybrook against Ramos Bros., Incorporated, had the effect of vesting the title of Ramos Bros., Incorporated, in Maybrook, this appeal must fail. . . . The judgment obtained by Maybrook is as conclusive evidence against Ramos Bros., Incorporated, that title was in Maybrook, as if Ramos Bros., Incorporated, had given Maybrook a deed. Like a deed, it was admissible against appellants as a muniment of title to show that *Maybrook through the judgment had acquired the title theretofore held by Ramos Bros., Incorporated.*[4] (Italics ours.)

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[3]Please see Appellants' Opening Brief, Appendix, pages 1-3, for extensive quotation from case.

[4]Please see Appellants' Opening Brief, Appendix, pages 3 and 4, for further quotation from case.

In *Perkins v. Benguet*, 55 Cal. App. 720 (132 Pac. (2d) 70), the decree was accepted as conclusive evidence against the defendant as to the ownership of said stock, even though the defendant was not a party to said decree.[5]

The rule announced in the foregoing cases apply alike to title of real or personal property.[6]

Thus the Declaratory judgment itself operated as a transfer of title of the May Film judgment from May Film Corporation to Joe May and through Joe May to the German Bank. It was not necessary for appellants to go behind this decree to establish that May Film Corporation no longer owned the judgment, or that the title thereto became and was vested in the German Bank. The decree itself was sufficient for that purpose.

(3) The Declaratory Judgment Was Admissible in This Action as "A Mumiment of Title" and Constituted Evidence Against Appellee Even Though Appellee Was Not a Party to That Action.

All questions of evidence, including its admissibility and sufficiency, are, of course, governed by the law of the forum. (*Sayles v. Peters*, 11 Cal. App. (2d) 401, 407 (54 Pac. (2d) 94), 78 A. L. R. 884; also see App. Op. Br. p. 46.)

The leading case which announced the rule that the Declaratory judgment was admissible and constituted evi-

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[5]Please see Appellants' Opening Brief, Appendix, pages 4-12, inclusive, for extensive quotation from case.

[6]Please see pages 47, Appellants' Opening Brief, for extensive quotation of authorities.

dence against appellee is *Barr v. Gratz's Executors,* 4 Wheat. 213, 4 L. Ed. 553, wherein Justice Story states the rule as follows:

> "Another error alleged is, that the court allowed the decree of the Circuit Court, in the chancery suit between Michael Gratz and John Craig and others, to be given in evidence to the jury. In our opinion this record was clearly admissible. It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of plaintiff's title, and constituting a part of the muniments of his estate; without establishing the existence of the decree, it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiffs, which was made under the authority of that decree; and under such circumstances to reject the proof of the decree, would be, in effect, to declare that no title derived under a decree in chancery, was of any validity except in a suit between parties and 221*) privies, so that in* a suit by or against a stranger, it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta.*"

Chapman v. Moore, supra, cites and follows the *Barr* case. On page 515 the Court states:

> "These authorities declare the exception to the general rule to be well established that a party claiming under a judgment is entitled to prove it as a muniment in his chain of title. . . . So with the

judgment. . . . As it was as effective against Patterson's claim of title as if he had made Davis a deed to the property, it was, under the rule heretofore stated, admissible for the same purpose that his deed would have been—as a muniment of title. Being so admissible, it, with the previous concession of legal title in Patterson and the presumption arising therefrom, together with the conveyance from David to plaintiff, established in him *prima facie* title to the property, *which in the absence of any evidence of title in the defendant* would have warranted a judgment in his favor against the defendant Moore, and the finding of the court in the face of this *prima facie* showing that plaintiff was not the owner was not justified by the evidence. . . ." (Italics ours.)

To same effect see *Title Insurance Company v. U. S. F. & G. Co., supra; Perkins v. Benguet, supra.*

In fact, the rule announced in the foregoing case is of universal application. (See App. Op. Br. pp. 46 and 47 for long list of authorities.)

Therefore, it follows that the Declaratory judgment is evidence herein as "a muniment of appellants' title," and as such evidence it divested May Film Corp. of the ownership of May Film judgment, and transferred the same to, and established that ownership, firstly, in Joe May and through him in the German Bank.

(4) The Declaratory Judgment Not Only Was Admissible Against Appellee, but It Was Conclusive Evidence That May Film Corporation Did Not Own the May Film Judgment, and That Title Thereto Had Become and Was Vested in the German Bank. The Declaratory Judgment Admittedly Was Conclusive Between the Parties Thereto, and Since Appellee Contended That May Film Corporation, the Unsuccessful Party, Still Owned the May Film Judgment, Notwithstanding the Decree to the Contrary, Appellee, by Such Assertion, Stood in the Shoes of May Film Corporation, and Like May Film Was Conclusively Bound by Said Declaratory Decree.

When a debtor asserts that the unsuccessful party to a judgment, which has determined ownership of property, is in fact the owner of such property notwithstanding the judgment to the contrary, the debtor thereby becomes conclusively bound by that judgment even though he is not a party thereto. In such case, the debtor by espousing the unsuccessful parties' cause, stands in the shoes of the unsuccessful party, and like that party is conclusively bound by the judgment. This rule is stated, applied and followed in *Perkins v. Benguet,* 55 Cal. App. (2d) 720 (132 Pac. (2d) 70); *Hughes v. United Pipe Lines,* 119 N. Y. 423 (23 N. E. 1042); *Commercial National Bank v. Alloway,* 207 Iowa 419 (223 N. W. 167).

The factual situation in each of these cases are practically identical with the case at bar. In each case it was held that the determination of the ownership of the property in a judgment to which the debtor was not a part was nevertheless conclusive against such debtor in a subse-

quent action where the debtor asserted that the title to the property was in the unsuccessful party to such judgment.

These decisions, we submit, are conclusive against appellee's contention that it is proper for it to collaterally attack the Declaratory judgment. However, appellee's attack upon the Decree, even if proper, was *insufficient to defeat its adjudication.*

Dr. Golm's testimony (even if admissible) simply states that an assignment of the claim from May Film to Joe May was required to vest title in May; that with such assignment the transfer of the claim was valid and complete; that without it nothing passed to May. The record herein—Declaratory relief action—however affirmatively states that May Film actually assigned the claim to May. The "Facts" [R. p. 228] therein refer to, the "grounds for decision" [R. pp. 228-9] therein recite, and the witness therein testified [R. p. 236]: "It is correct that there was assigned to . . . Joe May . . . the claim against Universal. . . ." Dr. Golm stated that "An oral assignment could be sufficient" [R. p. 456]; "that it wasn't necessary that it be written." [R. p. 457.] *The Decree, therefore, is correct under German law under appellee's own testimony.* Dr. Golm's opinion (erroneously admitted over objection [R. pp. 334-5]) that the Decree was erroneous has no probative force and is without value as evidence herein. Both the hypothetical question asked, and the answer given, expressly assumed the absence of facts existing in the record, *i. e.*, that the claim was assigned by May Film to Joe May. That opinion

(even if admissible) is therefore governed by the rule stated in *Barnett v. Atchison Railway Co.*, 99 Cal. App. 310, 317 (278 Pac. 443):

> "The opinion of a witness upon assumed facts differing from those shown by the evidence cannot be given any probative force (Estate of Purcell, 164 Cal. 300, 308 (128 Pac. 932)), and when such opinion is given in answer to a question which does not take the facts proved into consideration it is without value as evidence."

To same effect:

Estate of Purcell, 164 Cal. 301, 308 (128 Pac. 932);

San Diego Land Co. v. Neal, 88 Cal. 50, 63 (25 Pac. 977).

(5) It Was Not Necessary for the Appellants to Establish the Facts Upon Which the Declaratory Judgment Was Based. The Facts Adjudicated in, and the Recitals of the Decree Constituted Evidence Herein and the Decree Itself Established the Facts Which It Adjudicated.

In *Perkins v. Benguet, supra*, it was held that the New York judgment, therein involved, and every finding upon which it was based was conclusive against the defendant in the California case, with respect to everything therein adjudicated, *i. e., res adjudicata* in the same way as if the defendant had been a party to the New York action, and the New York record and judgment was admitted as competent and conclusive evidence of plaintiff's title.

Further the recitals of the Decree are evidence herein. *Page v. Garver,* 5 Cal. App. 383, 385 (90 Pac. 481), states:

> ". . . we are nevertheless of the opinion that where a collateral attack is made, the recitals contained in the judgment are sufficient evidence of the matters therein recited. The judgment may be grossly unjust or erroneous, but the decision of the court as to all issues involved in the action stands as a finality between the parties and their privies until set aside in some mode recognized by law. (Jones on Evidence, Sec. 601.) In such case, where the judgment is one rendered by a court of general jurisdiction, the recitals contained therein constitute evidence of their truth and every intendment must be indulged in support of the judgment."

Simmons v. Threshour, 118 Cal. 100, 101 (50 Pac. 312), states:

> "As the record offered . . . was competent evidence of the final adjudication . . . so its recitals . . . were evidence of the facts recited; . . ."

In *Estate of Hunsicker,* 65 Cal. App. 114 (223 Pac. 411), it was held that the contents of a document attached to the petition in an adoption matter and the recitals in the Pennsylvania decree supplied the necessary evidence of jurisdictional facts urged therein to be lacking.

Besides it is well established that a judgment or decree necessarily affirming the existence of any fact is conclusive evidence of that fact when that fact again is in issue. While this rule primarily is one between the parties or privies to the judgment, it also is effective when the judg-

ment is used as a "muniment of title" in another action, and the defendant therein asserts the title to be in the unsuccessful party to the judgment. (*Perkins v. Benguet, supra; Elliott v. Bretsch,* 59 Cal. App. (2d) 543, 549 (139 Pac. (2d) 332); *Murdock v. Eddy,* 38 Cal. App. (2d) 551, 554 (101 Pac. (2d) 722).)

Therefore, when the record of the Declaratory judgment recited that Joe May acquired the claim against Universal; that said claim had been assigned to the German Bank, and that such assignment was valid, those facts were conclusive as between the parties to that action, to-wit, the German Bank and May Film. They also become conclusive in this action against appellee when it asserted that, as between the German Bank, May and May Film Corp., May Film Corp. was still the owner of the May Film judgment notwithstanding the contrary decree. This contention May Film itself could not urge. It was concluded by the decree. Therefore, appellee likewise was concluded. Under its contention it stood in May Film shoes.

The opinion herein also states that there was no evidence of the assignment set forth in the letter dated February 12, 1936 [Pl. Ex. 5]; or that it was ever executed or existed. Again this Court has overlooked certain testimony. Joe May testified at the trial that the assignment, a copy of which is set forth in Exhibit 5, was actually signed by him and delivered to the German Bank. [R. p. 482.] Dr. Lenk also testified that Joe May delivered to the German Bank the assignment of a claim of May Film

v. Universal Pictures Corporation of New York. [R. pp. 280-1, 289.]

Appellants, therefore, established their first link in their chain of title. By the Declaratory judgment the title to the May Film judgment was taken from May Film Corp. and through Joe May was placed in the German Bank. The German Bank, therefore, acquired the *May Film judgment*.

B. The Assignment From German Bank to Mandl.

This is the second link in appellants' chain of title. This Court, in referring to that assignment, states:

> "There was no evidence of any such assignment. Mandl testified that a claim of the German Bank against Bank, but did not testify that the Mayfilm judgment was assigned to him by the German bank or anyone else. There was no evidence that the German bank ever owned the Mayfilm judgment."

Here again we have an illustration of the basic error which has permeated the entire opinion, *i. e.*, an erroneous distinction between the ownership and assignment of the "claim," and the ownership and assignment of the May Film judgment itself. This, we have shown, under both the German and American law to be incorrect. Undoubtedly this error was caused by the fact that this Honorable Court obviously overlooked and failed to consider the oft-repeated evidence—that under German law it is the claim which is assigned; the judgment as such cannot be assigned and that title to the judgment follows title to the claim.

(1) The Assignment of the Claim Against Universal to Mandl Constituted an Assignment of the May Film Judgment Itself, Since Only the Claim, and Not the May Film Judgment as Such, Could Be Assigned; However, the Title to the May Film Judgment Followed the Title to the Claim. Mandl Therefore Acquired the May Film Judgment.

Mandl testified that after he paid the German Bank upon his guarantee, the said bank gave him an assignment of a certain claim they held against Universal. [R. pp. 263-4, 270.]

This Court's criticism of this assignment was that the testimony disclosed that only an assignment of the claim against Universal was made, but that it failed to disclose any assignment of the May Film judgment itself.

This criticism is without valid basis, because in making such statement this Court failed to consider the fact that under German law it was the claim, not the judgment, which was assigned, and that the title to the judgment followed the title to the claim. Therefore, when Mandl stated that the claim against Universal was assigned to him by the German Bank, this assignment as a matter of law transferred the May Film judgment to him. Evidence similar to Mandl's testimony has been upheld as sufficient to establish an assignment. In *Bank of Italy v. Bettencourt*, 214 Cal. 571, 575-6 (7 Pac. (2d) 174), the Supreme Court of California held that the following question, "Did the Bank of Italy purchase the Bank of Moon Bay and its properties?" and the answer thereto, "Yes," was sufficient to uphold the transfer and succession to the

properties. In holding that the objection thereto was only technical, the Court stated:

> "No attempt was made by appellants to show by cross examination, or otherwise, that plaintiff was not the owner of said notes. Surely no other action could be maintained to compel a second payment of the notes."

In *Brown v. Patella*, 24 Cal. App. (2d) 362 (75 Pac. (2d) 119), testimony that a note was handed to a party and he was told to "endorse an assignment to one A. B. Brown" and to have it executed, was held sufficient to support an assignment of the note, even though no such assignment was endorsed upon it.

The lower Court held such evidence insufficient and the Appellate Court reversed the judgment in favor of the defendant.

And so in the case at bar. Appellee made no attempt by cross-examination, or otherwise, to disprove the assignment testified to by Mandl, nor to inquire into the mechanics or formalities by which it was made. Furthermore, appellee's witness admitted that the German Bank was obligated to assign the claim to Mandl [R. pp. 354-6] who was entitled to receive it. [R. p. 371.]

This evidence is particularly sufficient since appellee is fully protected under both the German and American law from further claim by or liability to the Bank. Both the assignment and the "notice" from the German Bank [Pl. Ex. 11. R. pp. 295-7] under German law, Section 409 [R. p. 439], also Golm's testimony [R. pp. 349, 428], completely protects the appellee from "double" liability; and under American law, both the assignment and the

notice which itself constitutes an equitable assignment, affords appellee the same full protection.

The appellee's rights are therefore governed by the following rule stated in *Bartlett Estate Co. v. Fraser,* 11 Cal. App. 373, 376 (105 Pac. 130):

> ". . . appellant is fully protected from further litigation or liability in connection with any claim of the bank on the paper, and this should be the full measure of his right to enforce proof of assignment, or to question its validity."

(See also Op. Br. pp. 67, 84.) It is also significant that prior to suit appellee denied liability *solely on other grounds.* [Pl. Ex. 13, R. pp. 520-22; Deft. Ex. B, R. p. 308.]

There can be no valid criticism of the assignment, because of any uncertainty or error as to the date of the assignment. The evidence shows that it was made *after* Mandl paid his guarantee to the German Bank. [R. p. 270.] This was sometime in 1936. The *fact* of an assignment, *not* the *date* thereof, governs; and if there is an erroneous date given, the date may be disregarded where the contents and the surrounding circumstances sufficiently describe the claim actually transferred, without the date. *Binford v. Boyd,* 178 Cal. 458, 464 (174 Pac. 56.) This principle is especially applicable herein.

Neither was it necessary to produce the original assignment. *No objection was interposed on that ground,* nor was that the basis of the trial court's decision; besides, its whereabouts was unknown. [R. p. 264.] Wherever it was, it was clear from the testimony [R. p. 262] that it was *beyond the jurisdiction of the Court.* Secondary evidence, therefore, was proper.

In *Burton v. Driggs*, 20 Wall. 125, 134, 22 L. Ed. 299, 302, Mr. Justice Swayne, after ruling that secondary evidence of a written document was admissible in the absence of a specific objection, stated the following rule:

> "In the present case the witness lived in another State and more than one hundred miles from the place of trial. The process of the court could not reach him; for all jurisdictional purposes he was as if he were dead. It is well settled that if books or papers necessary as evidence in a court in one State be in the possession of a person living in another state, *secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary.*" (Italics ours.)

In *Mackroth v. Sladky*, 27 Cal. App. 112, 199 (148 Pac. 978), the rule is stated as follows:

> "The trial court did not err in its ruling permitting secondary evidence of the contents of the plaintiff's letter introducing the defendant to de Castro. It was established in evidence that this letter was written and addressed by the plaintiff to de Castro in Mexico. De Castro testified that the letter, if it was still in existence, was at the time of the trial among his private papers in Mexico; and 'a letter that is beyond the territory of the state is, within the meaning of the statute, "lost" so as to allow secondary proof of its contents.' (Zellerbach v. Allenberg, 99 Cal. 57, 73 (33 Pac. 786, 791).)"

The factual situation in the foregoing case and the case at bar are strikingly similar. Here Mandl testified that he did not know where the assignment was. [R. p. 264.] He testified, however, that certain documents and

letters were in Vienna at that time. [R. p. 262.] To same effect:

Zellerbach v. Allenberg, 99 Cal. 57-73 (33 Pac. 786);

Gordon v. Searing, 8 Cal. 49;

20 *Am. Jur.* 386, Par. 434.

The trial court also stated:

". . . I am willing to agree that any document in Germany may be proved by *secondary* evidence because of the war conditions. . . ." [R. p. 474.]

We therefore submit that appellee's objection to, and this Court's criticism of the assignment from Bank to Mandl have been completely answered.

(2) Even if Mandl's Testimony Were Deemed Insufficient to Show an Actual Assignment, Nevertheless, the Letter Dated February 12, 1936 (Plaintiff's Exhibits 5 and 11) from the German Bank to Universal, by Itself Was Sufficient to Transfer the May Film Judgment From German Bank to Mandl.

This document [Pl. Exs. 11 and 5] was more than a mere "notice." It contained a recital of the transactions had; recited that the claim against Universal had been transferred to Mandl, and directed Universal to pay the claim to Mandl, and stated that the debt could only be satisfied by the payment to Mandl. This letter, coupled with the fact that Mandl by paying the Bank upon his guaranty was entitled to receive the May Film judgment and that the German Bank was obligated to assign it to him, clearly establishes the letter as an equitable *assignment.* As such it transferred the claim, and therefore May Film judgment to Mandl.

As stated in *Walmsley v. Holcomb,* 61 Cal. App. (2d) 578, 584 (143 Pac. (2d) 398):

> "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place. (See also, Goldman v. Murray, 164 Cal. 419, 422 (129 P. 462).)"

It is, of course, well established, that the order, direction or request of a creditor to his debtor that the latter shall pay money due to the former to a third party constitutes an equitable assignment, and vests the ownership of the funds in the third person, with the right to prosecute the action against the debtor for the recovery thereof. (*Purterbaugh v. McCray,* 25 Cal. App. 468, 471 (144 Pac. 149).)[7]

The same rule is also applicable in New York. (*Hinkle Iron Company v. Cohen,* 229 N. Y. 179 (128 N. E. 133).)[8]

Most certainly appellee could not complain of such interpretation of the letter, because under German law, Section 409, German Civil Code [R. p. 439], the German Bank no longer could collect the debt from appellee. It was estopped from doing so. It had divested itself of that right. [R. pp. 349, 428.] As an assignment appellee also would be fully protected under American law.

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[7]Please see Appellants' Opening Brief, pages 64 and 65, for extensive list of authorities.

[8]Please see Appellants' Opening Brief, page 66, for extensive citation of authorities.

The letter constituted an assignment upon a further ground. It authorized Mandl to collect the German judgment from appellee. This, coupled with the fact that Mandl was entitled to the proceeds of said judgment because he had parted with value, constituted an agency coupled with an interest. This also was sufficient as an assignment. (*Rufe v. Commercial Bank, supra; Hunt v. Rousmanier's Adms.,* 8 Wheat. 205, 5 L. Ed. 597; 3 *Cal. Jur.* 266.)

We therefore submit that for the various reasons hereinbefore stated, there was an assignment of May Film judgment from the Bank to Mandl.

The German Bank at the time of said assignment did own the May Film judgment. The Bank was declared to be the owner of the claim by virtue of the Declaratory judgment. This was an adjudication that it was the owner of the May Film judgment. Furthermore, since the claim which was referred to in the letter had then actually been merged into, and was then evidenced by the May Film judgment, this, as a matter of law, amounted to an assignment of the May Film judgment itself. The claim and the judgment were inseparable. *(Rufe v. Commercial Bank, supra.)*

(3) Even if There Was No Actual or Equitable Assignment, Mandl Acquired the Mayfilm Judgment by Operation of Law.

The evidence is uncontradicted that the German Bank made a loan to May Film Corporation. [R. pp. 273-4, 279-80, 258.] That Joe May and Mandl were guarantors of said loan. [R. pp. 261-2, 280-1.] That May assigned the May Film judgment to the German Bank [R. pp. 482, 280-1, 289]; that this assignment was by way of security

for the May Film obligation [R. p. 246]; that Mandl paid the loan under his guaranty. [R. pp. 262-3, 270.]

Appellee's witnesses conceded that under these facts that the German Bank was obligated to assign the May Film claim to Mandl [R. pp. 354-6] and that Mandl was entitled to receive it [R. pp. 371, 354-6]; that the "notice" to Universal by the Bank fully protected Universal against further claim by the Bank. [R. pp. 349, 428.]

Under German law these facts transferred the May Film judgment to Mandl by operation of law. Section 774, German Civil Code, provides:

> ". . . that the claim of the creditor against the principal debtor is transferred to him . . ."

the paying guarantor.

Section 401, German Civil Code, provides:

> ". . . with the assigned claim the mortgages or liens belong to it, as well as the rights arising out of a security given for it, are transferred to the assignee." [R. p. 434.]

Thus, we submit, that if by no other means, the May Film judgment was transferred to Mandl *by operation of German law*, and thereby became the legal owner by the May Film judgment.

Appellants therefore established their second link in their chain of title which placed the ownership of May Film judgment in Mandl.

C. The Assignment From Mandl to Union Bank.

This is the third link in appellants' chain of title. It was evidenced by Plaintiff's Exhibit 6. [R. pp. 254-6.] This Court in its opinion states:

> "The evidence showed that on April 22, 1936, Mandl executed what purported to be an assignment to Union Bank, but that was not, and did not purport to be, an assignment of the Mayfilm judgment. It purported to be an assignment of a claim. There was no evidence that Mandl ever owned the Mayfilm judgment."

Again we respectfully submit that this statement is incorrect. Again this Court has made an unwarranted distinction between the assignment of the claim, and the assignment of the judgment. This is not permitted under either American or German law. Again this Court has overlooked important evidence. That portion of the opinion which stated that there was no evidence that Mandl ever owned the May Film judgment, obviously is based upon the assumption that the various assignments of the claim against Universal and the adjudication of the ownership of the claim in the Declaratory judgment, were insufficient to pass the title to the May Film judgment itself. This theory has clearly been demonstrated by the evidence and the applicable law to be incorrect.

(1) There Was No Issue as to the Sufficiency of the Assignment From Mandl to Union Bank During the Trial. Appellee Conceded That It Was Sufficient to Transfer Mandl's Interest in the May Film Judgment to the Union Bank if Mandl Had Any Ownership in the Judgment.

This assignment was never questioned at the trial. In fact its sufficiency was conceded by both Court and counsel. The trial court in its opinion stated [R. p. 30]:

> "Mandl assigned to Union Bank and Trust Company of Los Angeles, who assigned to plaintiffs. These last two assignments not being questioned, the problem calls for the determination of two questions only."

When the said assignment was offered in evidence, appellee's counsel conceded its sufficiency:

> "Mr. Blum: This is the assignment from Fritz Mandl to (41) the Union Bank, and the translation.
>
> Mr. Selvin: As an assignment, I have no objection to it, but I object to it if it is offered to prove the truth of any of the recitals upon the ground that they are self-serving and not binding upon the defendant. They have the habit, in these things, to tell the whole history whenever they start to show an assignment.
>
> The Court: They are no worse than our 'whereases.'
>
> Mr. Selvin: I object to the document if it is offered for the truth of any of the recitals. As far as an assignment from Mandl to the Bank is concerned, I am willing to stipulate that if Mandl had anything he assigned it to the Union Bank, but I won't stipulate that he owned anything at the time he assigned it.
>
> Mr. Hirschfeld: That is all right.

The Court: I cannot single out any recital from the ultimate facts which are set forth. The assignment and the translation will be received as one exhibit.

* * * * * * * *

The Court: It may be received as Exhibit 6 in evidence." [R. pp. 253-4.]

Thus it becomes apparent that this Court created an issue as to this assignment when in fact no issue existed at the trial below. Nevertheless we submit that this Court's determination thereof is erroneous.

(2) The Assignment by Mandl of the Claim Against Universal to Union Bank Was in Fact Sufficient to and Did Transfer the May Film Judgment to the Union Bank.

It must be remembered when this assignment was made the claim against Universal was then merged into and evidenced by the May Film judgment itself. Therefore, the assignment of the claim transferred with it the ownership of the May Film judgment itself. As stated in *Rufe v. Commercial Bank, supra:*

> "By whatever terms the assignment was made, if the debt passed, all rights and remedies for its collection also passed with it. The right to the debt, as evidenced by the judgment against the defendants, cannot exist in the hands of different persons. One cannot hold the judgment and another the debt. They are inseparable. . . . So when the instrument passed the whole sum evidenced in the judgment . . . with that passed 'also all the rights and remedies for its recovery and collection'; that is to say, the judgment and its incidents."

To same effect:

Ashburn v. MacDonald, supra;

Batesville v. Kaufmann, supra;

North v. Evans, supra;

Brown v. Scott, supra;

Pattison v. Hull, supra;

Bolan v. Crosby, supra.

Obviously the author of said assignment was familiar with the German law to the effect that only the claim could be assigned, that the judgment as such could not be, and that title to the judgment followed title to the claim. Hence the terminology of said assignment. This, however, did not invalidate the assignment or render it insufficient, for under American law the judgment followed the claim. The same rule was applicable under German law. In either case the May Film judgment itself was transferred from Mandl to Union Bank.

This Court's comment upon the assignment with an observation that two claims are specified therein and that the Court does not know one or two claims were assigned to the Union Bank, is undoubtedly due to the fact that this Court has overlooked explanatory evidence.

(3) The Term "This Claim" Mentioned in the Said Assignment Clearly Refers to the Claim Against Universal, but if Any Ambiguity Exists in Said Assignment, the Evidence Clearly Discloses That Mandl Intended to and Did Assign the Claim Against Universal Which Carried With It the May Film Judgment Itself.

Interpreting the assignment within its four corners, we submit that "this claim" can only refer to the claim against Universal.

The word "this" is a demonstrative word and refers to the subject that is most clearly related and the nearest to it in location.

The term in the assignment nearest to the expression "this claim" are the words "including the claim against Universal has been transferred to me, Fritz Mandl"; the term "this claim" must therefore refer to that claim, to-wit, claim against Universal; however, the testimony of Fritz Mandl himself clearly shows that by his assignment, he intended to and did transfer to the Union Bank the claim against Universal.

> "Q. I show you a document, plaintiff's Exhibit 2 for identification, and ask you whether it is your signature?
>
> Mr. Selvin: That is already in evidence as plaintiffs' Exhibit 6 isn't it? It is the assignment from Mandl to the Union Bank.
>
> Mr. Hirschfeld: Yes.
>
> The Court: All right.
>
> A. Yes.
>
> Q. Do you recall when you executed this document? A. Yes, 1936.
>
> Q. I show you the document marked plaintiffs' Exhibit 2 for identification and ask you when you affixed your signature? A. On April 22, 1936.

Q. And what does this document represent?

Q. *Is this document an assignment by you of certain claims against Universal Pictures Corporation to the Union Bank and Trust Company of Los Angeles?*

Mr. Selvin: The document will speak for itself.

The Court: Do you insist on the objection? (57)

Mr. Selvin: I do. I think the document speaks for itself.

The Court: Well, he may identify it. Objection overruled.

A. Yes.

Mr. Taub: I offer it in evidence.

That is the document which has been received as plaintiffs' Exhibit 6.

Q. This assignment which you made to the Union Bank and Trust Company originated as an assignment to you from the Bank for Foreign Commerce in Berlin, is that correct?

* * * * * * * *

A. Yes, the same thing." [R. pp. 268-9, 270.] (Italics ours.)

(4) **It Is Also Fundamental That the Language of an Assignment Must Be Construed With Reference to the Facts and Circumstances of the Particular Case. The Circumstances Under Which an Assignment Was Made May Be Considered in Determining the Meaning and Scope Where the Terms and Understanding Are Ambiguous.**

Adamson v. Paonessa, 180 Cal. 157, 164 (179 Pac. 880);

Austin v. Hallmark Oil Co., 21 Cal. (2d) 719, 730;

Curtain v. Kowalsky, 145 Cal. 431 (78 Pac. 962).

(5) It Is Also Elemental That in Determining the Scope and Effect of an Assignment, It Must Be Construed so as to Render It Valid, or Result in Effectuating the Manifest Intention of the Parties.

3 *Cal. Jur.* 283.

(6) It Is Also Fundmental That Both Where the Assignor and the Assignee Admit and Concede That the Assignment Has Been Made, the Debtor Cannot Question the Validity or the Effectiveness Thereon.

Dorner v. Hefner, 15 Cal. App. (2d) 97, 101; 58 Pac. (2d) 1308;

Van Dyke v. Gardner, 49 N. Y. Sup. 328, 22 Misc. 113.

We therefore submit that the evidence herein disclosed, when interpreted in the light of the applicable law, that appellants established their third link in the chain of title, to-wit: the transfer of May Film judgment from Mandl to Union Bank.

D. The Assignment From Union Bank to Appellants.

This assignment [Pl. Ex. 8, R. p. 258] was not questioned below, or by this Court, except that this Court states that there was no evidence to show Union Bank owned the May Film judgment. This statement was based upon the theory adopted by this Court that the various assignment of the *claim* against Universal was not an assignment of the May Film judgment itself. This we have shown in the preceding portions of this Petition to be incorrect. We have already shown that Union Bank did in fact own the May Film judgment when it made its assignment to appellants.

This completes appellants' chain of title, and established their ownership to the May Film judgment. Appellants, therefore, are entitled to recover.

IV.

The Opinion Herein Fails to Disclose or Pass Upon Various Points Urged by Appellants in Their Briefs. A Full Consideration of These Points Are Necessary for a Complete Determination of this Case.

It would unduly extend this Petition to again reiterate the various points set forth in appellants' briefs. We therefore make reference to the various points urged in appellants' briefs, in the firm belief that this Honorable Court will reconsider and re-examine the same in the determination of this Petition.

Conclusion.

If this petition may seem of unusual length, we respectfully ask the Court's kind indulgence. We sincerely believe that only by a thorough presentation of the evidence and the law can we adequately demonstrate to this Court that the opinion herein is basically incorrect. We respectfully contend that this Court in examining the judgment herein overlooked important evidence upon vital issues and failed to consider all of the testimony in determining this appeal. We also sincerely believe that the Court was acting under a misapprehension as to both the German and the American law, and that but for such factors, this Court would never have affirmed the opinion. We respectfully submit that the evidence herein when viewed in the light of the applicable law is fully sufficient to establish appellants' ownership to the Mayfilm Judgment and that appellants are entitled to recover herein.

We therefore respectfully submit that this Petition for a Rehearing should be granted; that this cause be again restored to the calendar and that upon a re-determination of this appeal, the judgment herein be reversed.

Respectfully submitted,

ELLIS I. HIRSCHFELD,

SAMUEL W. BLUM,

Attorneys for Appellants.

CERTIFICATE OF COUNSEL.

We, counsel for the appellants, John Luhring and Margaret Morris, do, and each of us does, hereby certify that the foregoing Petition for Rehearing of this cause in our opinion is well founded and not interposed for delay.

ELLIS I. HIRSCHFELD,

SAMUEL W. BLUM,

Attorneys for Appellants.